UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHELLI CALDWELL, Plaintiff, v. KENNETH BROWN, *et al.*, Defendants.	No. C09-1332RSL ORDER GRANTING CITY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on "Defendants' Motion for Summary Judgment." Dkt. # 19. Defendants City of Bellingham, Kenneth Brown, and Steve Felmley seek dismissal of all of the claims against them. Having reviewed the memoranda, declarations, and exhibits submitted by the parties and having heard the arguments of counsel,[1] the Court finds as follows:

A. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact that would preclude the entry of judgment as a matter of law. The party seeking summary dismissal of the case "bears the initial responsibility of informing the district court of the basis for its motion"

[1] The Court has not considered the first sentence of ¶ 39 of the Declaration of Shelli Caldwell (Dkt. # 41). Defendants' other evidentiary objections are overruled.

(Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)) and identifying those portions of "the pleadings, the discovery and disclosure materials on file, and any affidavits" that show the absence of a genuine issue of material fact (Fed. R. Civ. P. 56(c)). Once the moving party has satisfied its burden, it is entitled to summary judgment if the non-moving party fails to designate "specific facts showing that there is a genuine issue for trial." Celotex Corp., 477 U.S. at 324. "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient," and factual disputes whose resolution would not affect the outcome of the suit are irrelevant to the consideration of a motion for summary judgment. Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In other words, "summary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor." Triton Energy Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th Cir. 1995).

B. 42 U.S.C. § 1983

Plaintiffs have asserted claims under the Fourth and Fourteenth Amendments of the United States Constitution. Section 1983 of the Civil Rights Act of 1964 provides the means to vindicate such claims. It creates a federal cause of action against any person who, acting under color of state law, deprives another of a right, privilege, or immunity secured by the Constitution or the laws of the United States. See, e.g., Kildare v. Saenz, 325 F.3d 1078, 1085 (9th Cir. 2003). The statute does not create substantive rights, but merely provides "a method for vindicating federal rights elsewhere conferred." Graham v. Conner, 490 U.S. 386, 393 (1989).

C. DUE PROCESS CLAIMS

1. Substantive Due Process -- Fundamental Liberty Interest

The Due Process Clause of the Fourteenth Amendment protects certain individual liberties from state interference, regardless of the process provided, unless the infringement is narrowly tailored to achieve a compelling state interest. Reno v. Flores, 507 U.S. 292, 301-02

(1993). Plaintiffs claim that their familial relationship is entitled to substantive protection under the Due Process Clause. They have not identified, and the Court has not found, any case in which a relationship of the type asserted here has garnered constitutional protection.

Freedom of personal choice in matters of family life is one of the liberties protected by the Due Process Clause. Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977). The mere fact of blood relation or even the close personal ties associated with extended family do not, however, give rise to a constitutionally-protected interest. It is only when extended family members have long-standing custodial relationships and constitute an "existing family unit" that a liberty interest in familial association and integrity arises. Osborne v. County of Riverside, 385 F. Supp.2d 1048, 1054 (C.D. Cal. 2005) (citing Moore, 431 U.S. at 499; Miller v. California, 355 F.3d 1172, 1176-77 (9th Cir. 2004); Mullins v. State of Oregon, 57 F.3d 789, 794 (9th Cir. 1995).

The issue is not whether the grandparent-grandchild relationship is entitled to respect and some level of recognition in our society. As the United States Supreme Court has recognized, grandparents often play an "important role" in the lives of their grandchildren. Troxel v. Granville, 530 U.S. 57, 64 (2000) (plurality opinion). President Barack Obama, who was largely raised by his grandparents, refers to his grandmother as "the cornerstone of our family." Donna Butts, Editorial, Wash. Post, Jan. 16, 2010 at A 17. According to U.S. Census data, 5.8 million American adults over the age of thirty lived with at least one grandchild in 2000. U.S. Dep't of Commerce, U.S. Census Bureau, Census 2000 Brief C2KBR-31, Grandparents Living with Grandchildren: 2000 1 (2003). By 2008, sixteen percent of Americans were living in multigenerational families. Sam Roberts, Extended Family Households Are on the Rise, N.Y. Times, Mar. 19, 2010 at A12. The question is not whether grandparents are important members of the American family: they are. Nevertheless, the normal grandparent-grandchild relationship has not garnered constitutional protection under the Due Process Clause. See, e.g., Mullins, 57 F.3d at 796. The question, then, is whether the

relationship between Shelli Caldwell and ZA on August 6, 2008, exceeded the normal grandparent-grandchild relationship by forming an existing family unit giving rise to a protectable liberty interest in familial association and integrity.

Even when taken in the light most favorable to plaintiffs, no reasonable factfinder could conclude that Ms. Caldwell had a long-standing custodial relationship with ZA or that, as of August 6, 2008, they formed an "existing family unit." Between 2001 and the day of Cristina's funeral, ZA lived with Ms. Caldwell for only one month. The evidence shows that Ms. Caldwell stepped in periodically to provide shelter, material support, and comfort when ZA's mother was physically or financially incapable of taking care of him. There is no indication, however, that Cristina abandoned her primary role as ZA's custodian or encouraged a parent-like relationship between ZA and his grandmother. In February 2008, Cristina specifically declined to terminate her parental rights or turn custody of ZA over to Ms. Caldwell. Even after Cristina died on July 29, 2008, ZA did not come live with Ms. Caldwell. He remained in the house where he and his mother and her fiancee had lived to minimize the disruption caused by his mother's death.

"Only those aspects of liberty that we as a society traditionally have protected as fundamental are included within the substantive protection of the Due Process Clause." Mullins, 57 F.3d at 793. The Court must "exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of [federal judges]." Brittain v. Hansen, 451 F.3d 982, 990 (9th Cir. 2006) (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997)). The relationship between Ms. Caldwell and ZA as of August 6, 2008, was that of extended family members, not parent and child. Based on the evidence presented, no reasonable factfinder could conclude otherwise. Because Ms. Caldwell and ZA did not enjoy a long-standing custodial relationship or live as an existing family unit at any time relevant to this dispute, defendants did not interfere with a fundamental liberty interest protected by the United States Constitution.

2. Substantive Due Process – "Shocks the Conscience"

Plaintiffs argue that defendants' conduct at Cristina's funeral shocks the conscience and therefore constitutes a constitutionally prohibited abuse of government power. Whatever one might think of the decision to execute the custody order at Cristina's funeral or the manner in which it was carried out, it is not enough for plaintiffs to allege conscience-shocking conduct. "There is no general liberty interest in being free from capricious government action." Nunez v. City of Los Angeles, 147 F.3d 867, 873 (9th Cir. 1998). In order to establish a constitutional violation under the substantive Due Process Clause, plaintiffs must show that the governmental action deprived them of a protected liberty interest. Brittain, 451 F.3d at 991. For the reasons discussed above, they have failed to do so.

3. Procedural Due Process

The Due Process Clause of the Fourteenth Amendment also provides a guarantee that the government will utilize fair procedures in connection with any deprivation of life, liberty, or property. Unlike the substantive component of the Due Process Clause, procedural Due Process applies to more than just deprivations of fundamental rights: it protects all liberty interests that are derived from state law or the Due Process Clause itself. Mullins, 57 F.3d at 795.

Under Washington law, a *de facto* parent stands in legal parity with biological and adoptive parents. In re Parentage of L.B., 155 Wn.2d 679, 707-08 (2005). Thus, before the state can deprive one of his or her role as *de facto* parent, it must provide adequate procedural protections. No trier of fact could reasonably find that Ms. Caldwell was ZA's *de facto* parent, however, as that term is defined by Washington law. Id., at 708. ZA's biological parent never consented to or fostered a parent-child relationship between Ms. Caldwell and ZA, Ms. Caldwell did not reside with ZA for any significant period of time after 2004, and Ms. Caldwell's participation in ZA's upbringing was that of an interim, emergency care giver rather than a parent. In the absence of a state law liberty interest in the continuation of their relationship,

plaintiffs' procedural due process claim fails.

D. UNLAWFUL SEIZURE CLAIMS

1. ZA's Right to be Free from Unlawful Seizure

Plaintiffs allege that ZA was "seized without probable cause in violation of his rights under the Fourth and Fourteenth Amendments to the United States Constitution." Complaint at ¶ 5.3. The only argument offered in support of this claim is that ZA had a constitutionally-protected right to continue his relationship with Ms. Caldwell without government interference. Opposition at 18. As discussed above, the constitution affords no protection for the extended family relationship shared by plaintiffs on August 6, 2008. Defendants possessed a valid court order transferring custody of ZA from Ms. Caldwell to the Allens. Plaintiffs have not shown that taking control of ZA in order to effectuate that transfer was unlawful or otherwise violated ZA's Fourth Amendment rights.

2. Ms. Caldwell's Right to be Free of Unlawful Seizure

Plaintiffs argue that, because Ms. Caldwell was ZA's *de facto* parent under Washington law, she could be guilty of custodial interference only if she attempted to conceal ZA from "the other parent." RCW 9A.40.060(2). This argument fails because, as of August 6, 2008, Ms. Caldwell was not ZA's *de facto* parent. As a "relative" of ZA, she could be guilty of custodial interference if she retained, detained, or concealed ZA from other persons, such as the Allens, who possessed a lawful right to physical custody. RCW 9A.40.060(1); RCW 9A.40.070(1).

Plaintiffs also argue that probable cause was lacking because Ms. Caldwell did not have sufficient knowledge of the temporary custody order to "intend" to deprive the Allens of their lawful right to custody. State v. Boss, 167 Wn.2d 710, 719-20 (2009). The evidence does not support plaintiffs' argument. Probable cause exists if "at the moment of arrest the facts and circumstances within the knowledge of the arresting officers and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner

had committed or was committing an offense." United States v. Jensen, 425 F.3d 698, 704 (9th Cir. 2005). Ms. Caldwell acknowledges that defendant Kingsley told her that she had a court order transferring custody of ZA from Ms. Caldwell to the Allens. Complaint at ¶ 3.19. The officers understood that Ms. Caldwell had been told that the court order granted custody to the Allens. Decl. of Lt. Steve Felmley (Dkt. # 22) at ¶ 11; Decl. of Sgt. Kenneth Brown (Dkt. # 26) at ¶ 13. Although there is divergent testimony regarding whether Ms. Caldwell was offered a copy of the actual custody order, it is clear that she was aware of the order and its essential terms. Having learned why defendant Kingsley and the officers were present at the funeral, Ms. Caldwell nevertheless informed the officers that she intended to take ZA home with her. In these circumstances, defendants had probable cause to believe that Ms. Caldwell was violating RCW 9A.40.070.[2]

E. QUALIFIED IMMUNITY

When a defendant claims qualified immunity from civil damages, plaintiff is required to show that the official has violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In the context of a motion for summary judgment, defendants bear the burden of showing that "a reasonable officer could have believed, in light of the settled law, that he was not violating a constitutional or statutory right." Gasho v. United States, 39 F.3d 1420, 1438 (9th Cir. 1994). Such is the case here.

As noted above, plaintiffs have not shown a violation of any constitutional right. Even if such a violation existed, the rights that were allegedly violated were not clearly

[2] Plaintiffs' contention that the officers had no reason to believe that Ms. Caldwell intended to hold ZA "permanently or for a protracted period" does not advance their argument. One can be guilty of custodial interference in the second degree without regard to the intended length of the interference. Because the officers had probable cause to believe that Ms. Caldwell was committing custodial interference, the Court need not determine whether they also had cause to believe that she was guilty of obstructing a public officer.

established for purposes of the qualified immunity analysis. "The relevant, dispositive inquiry . . . is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Saucier v. Katz, 533 U.S. 194, 202 (2001).[3] Given the substantial number of cases in which extended familial relationships have been denied substantive due process protection, the existence of a valid court order directing transfer of custody of ZA to the Allens, and Ms. Caldwell's statements and actions in defiance of that order, reasonable persons in defendants' positions could (and in fact would) have believed that their conduct in this case was lawful. The defendant officers are, therefore, entitled to qualified immunity.

F. MUNICIPAL LIABILITY

Absent a constitutional violation, there can be no municipal liability under § 1983. Collins v. City of Harker Heights, 503 U.S. 115, 121-24 (1992).

For all of the foregoing reasons, plaintiffs' claims against defendants Kenneth Brown, Steve Felmley, and the City of Bellingham are DISMISSED.

Dated this 3rd day of September, 2010.

Robert S. Lasnik
United States District Judge

[3] In Saucier v. Katz, 533 U.S. 194, 201 (2001), the Supreme Court established a two-step process for considering claims of qualified immunity: the trial court first had to determine whether defendant's conduct violated a constitutional right before determining whether the constitutional right was clearly established at the time of plaintiff's injury. The sequential analysis was designed to prevent constitutional law from stagnating. In a recent opinion, the Supreme Court authorized district courts to exercise their sound discretion when deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances of a particular case. Pearson v. Callahan, __ U.S. __, 129 S.Ct. 808, 821-22 (2009).